UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

DR. GORDON AHLERS, Plaintiff	:	
v.	:	Docket No. 2:00-cv-392
HEALTHSOUTH MEDICAL CLINIC, INC., Defendant	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Paper 59)

Defendant, HealthSouth Medical Clinic, Inc. ("HealthSouth"), moves for summary judgment on all claims brought by Plaintiff, Dr. Gordon Ahlers ("Dr. Ahlers"), under FED. R. CIV. P. 56. For the reasons stated herein, Defendant's motion is GRANTED.

BACKGROUND

A. HealthSouth's Acquisition of Dr. Ahlers' Clinic

In 1987, Dr. Ahlers established his own medical clinic on Shelburne Road which served as a walk-in ambulatory clinic that also took care of occupational medicine needs and provided what is commonly referred to as urgent care. (See Paper 64 at ¶ 1) On April 20, 1998, HealthSouth purchased Dr. Ahlers' Shelburne Road clinic for $425,000 in cash. (See

Paper 60 at ¶ 2) In exchange, Dr. Ahlers signed a Non-Competition Agreement. (See Id.)

The agreement precluded Dr. Ahlers from owning, operating, or managing any business competitive with the Occupational Medicine business of HealthSouth within a 15-mile radius of the Shelburne Road facility for seven years. (See Paper 61, Ex. C) Furthermore, Dr. Ahlers agreed not to hire or contract with any employee or former employee of HealthSouth. (See Paper 61, Ex. C) Under the agreement, HealthSouth agreed to pay Dr. Ahlers an additional $1,250 per month for 5 years, and to hire Dr. Ahlers as medical director at an annual salary of $150,000. (See Paper 60 at ¶¶ 2,7)

B. Dr. Ahlers' Employment with HealthSouth

Upon Dr. Ahlers' recommendation, HealthSouth hired Ahlers' former office manager, Susan Rogers-Low, to be the center manager. (See Paper 60 at ¶ 8) After Ms. Rogers-Low was hired and no longer had to report to Dr. Ahlers, the working relationship between them soured. (See generally, Paper 60 at ¶¶ 10-18; Paper 64 at ¶¶ 8-16) On numerous occasions, Dr. Ahlers made complaints about the administration of the clinic, including: his lack of involvement in marketing decisions (See Paper 60 at ¶¶ 10-11); his lack of involvement in hiring a nurse-practitioner (id. at ¶ 12); the clinic

policy of prioritizing occupational medicine patients (id. at ¶ 13); and the elimination of beepers for all personnel (id. at ¶ 14).

Two incidents stand out as particularly bothersome to Dr. Ahlers. First, he was unhappy when Ms. Rogers-Low instructed a nurse to shorten the duration of a patient's prescription in an effort to force that patient to pay an outstanding account balance. (See Paper 64 at ¶ 16) Dr. Ahlers heard of the suggestion, intervened, and the prescription was never changed. (See Paper 60 at ¶ 16) Second, Dr. Ahlers disagreed with the handling of personnel matters, in particular an incident in which receptionist Kerry Terrien gave Ahlers "the middle finger" when he questioned her about telephone protocol. (See Paper 60 at ¶ 17) In general, Ahlers' complaints stem from his concern that Ms. Rogers-Low was "making decisions which impacted medical care without properly involving him." (Paper 64 at ¶ 16)

In March 1999, Ms. Rogers-Low resigned from HealthSouth, citing an inability to work with Dr. Ahlers. (See Paper 61, Ex. G) After this departure, Ms. Terrien was asked to assume administrative obligations. (See Paper 60 at ¶ 19)

C. Dr. Ahlers' Resignation from HealthSouth

In May 1999, Ahlers decided to leave HealthSouth, "when it became apparent [HealthSouth was] going to make Kerry Terrien the facility manager." (Paper 61, Ex. A at 277) Ahlers concluded he "just [couldn't] work with her." (Id. at 287) Dr. Ahlers concedes there was no systematic effort to get rid of him and no one pressured him to leave. (Id. at 283-84)

In June 1999, Dr. Ahlers unsuccessfully requested that HealthSouth waive the Non-Competition Agreement. (See Paper 61, Ex. H) At the end of July 1999, two months after deciding to leave HealthSouth, Dr. Ahlers resigned. (See Paper 60 at ¶ 28)

D. Dr. Ahlers' New Clinic

Dr. Ahlers opened a new clinic in Williston, Vermont, within the 15-mile area prohibited by the Non-Compete Agreement. (See Paper 60 at ¶ 36) Dr. Ahlers contends his new clinic is a "family practice," which is not barred by the Non-Compete Agreement. (See Paper 64 at ¶ 37) To staff his new clinic, Dr. Ahlers solicited and hired two HealthSouth employees, Kim Gorton and Martha Kahanic. (See id. at ¶¶ 34-35)

HealthSouth was of the opinion that the location of the new clinic, as well as the solicitation and hiring of its employees, constituted a violation of the Non-Competition Agreement, and consequently HealthSouth requested he cease. (See Paper 60 at ¶ 37) When Dr. Ahlers declined to cease, HealthSouth discontinued the monthly payments provided for under the Agreement. (Id.)

E. Dr. Ahlers' Lawsuit

The discontinuation of payments by HealthSouth prompted Dr. Ahlers to file this action, consisting of six separate claims: constructive discharge in violation of public policy (Count I); constructive discharge in violation of HealthSouth personnel policy and procedures (Count II); promissory estoppel (Count III); breach of the implied covenant of good faith and fair dealing (Count IV); intentional infliction of emotional distress (Count V); and breach of the Non-Competition Agreement (Count VI). Before the Court is HealthSouth's Motion for Summary Judgment.

DISCUSSION

A motion for summary judgment is properly granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED.

R. CIV. P. 56(c); Lipton v. Nature Co., 71 F.3d 464, 469 (2d Cir. 1995). The burden is on the moving party to demonstrate there are no material facts genuinely in dispute. See Weinstock v. Columbia Univ., 224 F.3d 41 (2d Cir. 2000). In deciding a motion for summary judgment, the court must view the facts and all the inferences to be drawn therefrom in the light most favorable to the party opposing the motion. Howley v. Town of Stratford, 217 F.3d 141, 150-51 (2d Cir. 2000).

Count I: Constructive Discharge in Violation of Public Policy

Dr. Ahlers claims HealthSouth constructively discharged him in violation of public policy by refusing to remedy his complaints about alleged compromises to patient care. (See Paper 3 at ¶¶ 15-21) Although the parties devote much of their arguments as to whether a sufficient public policy is implicated, a more fundamental problem confronts Dr. Ahlers.

A constructive discharge occurs when an employer, rather than acting directly, "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (citations omitted). In determining whether a constructive discharge has occurred, "the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a

reasonable person in the employee's shoes would have felt compelled to resign." Id. Furthermore, the party claiming constructive discharge must demonstrate the intolerable conditions were imposed by the employer with the intent to induce resignation. See Kader v. People Software, Inc., 111 F.3d 337, 341 (2d Cir. 1997; see also In re Baldwin, 158 Vt. 644, 646 (1992).

Dr. Ahlers offers no evidence to support an inference that HealthSouth purposefully imposed conditions with the intent to induce resignation. On the contrary, Dr. Ahlers concedes there was no systematic effort or conspiracy by HealthSouth to get rid of him and no one pressured him to leave. (See Paper 60, Ex. A at 283-84) Instead, Dr. Ahlers argues the constructive discharge resulted from the failure to remedy "situations where [HealthSouth] office staff interfered with good medical care." (See Paper 64 at ¶ 26) Dr. Ahlers, however, ignores the necessary intent element.

Kader v. People Software is instructive. The employee in Kader cited his supervisor's sexual relationship with the employee's wife as the "intolerable" condition underlying the constructive discharge. The Second Circuit, however, affirmed summary judgment in favor of the employer. See 111 F.3d 337, 341. The court reasoned that the condition may have been intolerable and even intentional, but stressed the employee

did not offer any evidence to suggest the intolerable condition was intended to induce his resignation. Id. Similarly, while Dr. Ahlers may have found intolerable the allegedly compromised patient care, he adduces no evidence to support an inference that HealthSouth intentionally created an intolerable workplace in order to force his involuntary resignation. Accordingly, summary judgment is appropriate. See Kader, 111 F.3d at 341 (2d Cir. 1997).

Additionally, it is worth noting the Vermont Supreme Court has held that evidence of premeditation by the complaining employee can undermine claims of constructive discharge. See In re Bushey, 142 Vt. 290, 296 (1982) (citing Lane v. Dep't of Employment Sec., 134 Vt. 9 (1975)). In this case, the undisputed facts of Dr. Ahlers' resignation evidence premeditation: he made his decision to resign two months prior to formal resignation (See Ahlers Dep. at 129); and he tried to negotiate the terms of his departure with HealthSouth, specifically seeking a release from the Non-Competition Agreement (See Def's Ex. H). As in Bushey, the premeditation undermines any claim of involuntary resignation and instead evidences a planned, voluntary departure.

Count II: Promissory Estoppel

Dr. Ahlers claims he relied to his detriment on representations HealthSouth would operate the clinic consistent with medical practices and ethics, and that HealthSouth's failure to do so forced his resignation. (See Paper 63 at 21-22) HealthSouth argues there was neither an enforceable promise nor detrimental reliance. (See Paper 59 at 18-20)

"Promissory estoppel may modify an at-will employment relationship and provide a remedy for wrongful discharge." Foote v. Simmonds Precision Prods., 158 Vt. 566, 571 (1992). To survive summary judgment, Dr. Ahlers must present sufficient evidence on each element of his promissory estoppel claim. See McKenny v. John V. Carr & Son, Inc., 922 F. Supp. 967, 979 (D. Vt. 1996). Vermont has adopted the Restatement view of promissory estoppel: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise," Id. (citing RESTATEMENT (SECOND) OF CONTRACTS, § 90(1) (1981)).

As evidence of a promise, Dr. Ahlers points to certain provisions in the Employee Handbook that state generally the company's "corporate values" in "providing superior care" and

conducting its business in compliance with all applicable laws. (See Paper 60 at ¶¶ 20-23) Such general assertions, however, are "too indefinite to constitute a promise." See, e.g., McKenny, 922 F. Supp. at 980. Like the oral assurances of continued employment based on job performance in McKenny that were deemed too indefinite, these Handbook provisions from which Dr. Ahlers construes a "promise" are merely general expressions of company policy that cannot reasonably be expected to induce action.

While the Court need not address the issue of detrimental reliance, the deficiency with regard to this element is worth noting. The elements of promissory estoppel "specifically require that the promise induce the reliance," McKenny, 922 F. Supp. at 980. Here, Dr. Ahlers claims the "promises" induced him to "[give] up the thriving private practice" to work for HealthSouth. (See Paper 63 at 22) Dr. Ahlers, however, presents no evidence that his action was induced by the "promises" of providing superior care in compliance with all laws, as opposed to, say, HealthSouth's tender of $425,000 cash, an annual salary of $150,000, a monthly stipend of $1,250, and his admitted desire for a more relaxed work pace with no administrative duties.

Count III: Constructive Discharge in Violation of Personnel Policy and Procedures

Dr. Ahlers alleges constructive discharge in violation of a unilateral contract allegedly set forth in HealthSouth's policy handbook and procedures. (See Paper 3 at ¶¶ 30-33) This claim differs from the vast majority of implied contract claims in Vermont, in which an employee is terminated at will but claims the employer had unilaterally modified the at-will contract to create an implied contract with greater protections. Compare, Green v. The Vermont Country Store, 191 F. Supp. 2d 476 (D. Vt. 2002); Dillon v. Champion Jogbra, Inc., 819 A.2d 703 (Vt. 2002). In this case, Dr. Ahlers was not terminated; instead, he resigned. In short, he claims HealthSouth breached an implied contract thereby forcing him into involuntary resignation, which, he argues, amounts to constructive discharge. While the Court has already held Dr. Ahlers does not offer sufficient facts to sustain a constructive discharge claim, it is worth discussing why no implied contract existed.

Under Vermont law, there is a presumption that employment for an indefinite period is employment "at will." See Havill v. Woodstock Soapstone Co., 172 Vt. 625, 783 (2001). The presumption of at will employment, however, is only a rule of contract construction that can be overcome by evidence to the contrary. See Dillon, 819 Vt. at 706-07 (citations omitted).

An employer not only may implicitly bind itself to terminating only for cause through its manual and practices, but may also be bound by a commitment to use only certain procedures in doing so. Id. at 707 (citations omitted). Employee manuals or policy statements, however, do not automatically become binding agreements. Ross v. Times Mirror, Inc., 164 Vt. 13, 20 (1995). Instead, only those policies that are "definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced." Id. More importantly, "general statements of company policy" are not sufficient to create an implied contract. Green, 191 F. Supp. 2d at 481.

Dr. Ahlers identifies four sections from the HealthSouth handbook that he claims create an implied contract. (See Paper 60 at ¶¶ 20-23) First, he cites the "Corporate Values" pronouncement:

> The fundamental human relationship involved in the delivery of quality healthcare services are the foundation of our way of doing business.
>
> We are dedicated to providing superior care to those individuals whose lives are entrusted to us. Our primary focus is to respond to their needs. Our dealings with them will be professional, courteous, helpful, and cooperative.
>
> We expect honest, ethical behavior from ourselves and encourage it in others.

(See Paper 60 at ¶ 20) This section contains a general

statement of company policy that does not give rise to an implied contract because "there is no definite and objective promise" of any sort. See Green, 191 F. Supp. 2d at 481. This section is akin to the general policy statements which this Court has held on other occasions to fall short of creating an implied contract. See, e.g., LeBlanc v. United Parcel Serv., 972 F. Supp. 827, 831 (D. Vt. 1997) (granting summary judgment because general policies stressing fair treatment, cooperation, and communication did not expressly or impliedly promise specific treatment in specific situations).

Next, Dr. Ahlers cites the "Patient Rights" provision, which states:

> As an employee of HealthSouth, you are part of an organization dedicated to providing the highest quality care and service to our patients. All employees, regardless of job assignment, must treat patients with respect and professional courtesy at all times. Information about a patient's condition, care, treatment, personal affairs, or records is strictly confidential and is to be discussed only with attending physicians, facility management and other employees whose job assignments make access to such information necessary.

(See Paper 60 at ¶ 21) Like the "Corporate Values" section discussed above, this section contains no promise of any sort and instead contains a general statement of company policy.

Dr. Ahlers also invokes the "Compliance with Laws" section of the handbook, which states:

> HealthSouth expects the support of each employee in its commitment to conduct Company operations in compliance

> with all applicable laws, including laws relating to employment practices, protection of the environment, and relationships with physicians, payors, and other referral sources. If you become aware of a violation or potential violation of a law, report it to your supervisor. If you are not comfortable reporting it to your supervisor, or you do not believe a reported violation was handled appropriately, you may submit a written description of the suspected violation to the Executive Vice President and Secretary at the Corporate office. You may remain anonymous when reporting a suspected violation, though it is best to identify yourself in order to assist in any subsequent investigation. Your continued employment will not be affected by a good faith report of a suspected violation; however, knowingly filing a false report of a suspected violation will result in discipline, up to and including discharge.

(See Paper 60 at ¶ 22) This section contains a "definitive and objective promise for a specific course of treatment for specific employee conduct," i.e., no retaliation for reporting violations, and therefore could give rise to an implied contract. Cf., Green, 191 F. Supp. 2d at 481 (rejecting implied contract claim because general policy statements cited by employee contained no definite promise for specific treatment for specific conduct). Dr. Ahlers, however, does not allege retaliation, and therefore this section is of no help to him.

Finally, Dr. Ahlers cites the "Violations of Conduct Standards" provision of the handbook, which states:

> In general, grounds for dismissal include any action that compromises our ability to deliver high-quality patient care, violates Company or patient confidentiality, or jeopardizes the Company's reputation. This includes, but is not limited to,

> insubordination, dishonesty, falsification of records, discourteous treatment of patients, physicians, fellow employees or the public, divulging information concerning patients or other violations of confidentiality.

(See Paper 60 at ¶ 23) Like the "Compliance with Laws" section, this section is of no help to Ahlers' implied contract claim because he does not allege dismissal in violation of this section.

The sections cited by Dr. Ahlers either state general policy ("Corporate Values" and "Patients' Rights") or explain a course of conduct not relevant here ("Compliance with Laws" and "Violations of Conduct"). None of the sections cited, however, would allow a rational jury to conclude that an applicable implied contract existed, and therefore summary judgment is appropriate on this count.

Count IV: Breach of Covenant of Good Faith and Fair Dealing

Dr. Ahlers' claim for breach of an implied covenant of good faith must be dismissed because "Vermont law does not recognize the implied covenant of good faith and fair dealing as a means of recovery where the employment relationship is unmodified and at-will." Green, 191 F. Supp. at 482 (internal quotations and citations omitted).

Count V: Intentional Infliction of Emotional Distress

Dr. Ahlers has abandoned this claim. (See Paper 61, Ex. A, pp. 385-386; see also Paper 64, ¶ 39) HealthSouth is therefore entitled to summary judgment on this count. See, e.g., Douglas v. Victor Capital Group, 21 F. Supp. 2d 379, 393 (S.D.N.Y.)(granting summary judgment on plaintiff's abandoned claims).

Count VI: Breach of Contract

Dr. Ahlers claims HealthSouth violated the terms of the Non-Competition Agreement ("Agreement") when it discontinued his $1,250 monthly payments. (See Paper 3 at ¶¶ 43-47) HealthSouth, however, responds that it was justified in discontinuing payments because Dr. Ahlers breached the Agreement first by opening a competing clinic and hiring away HealthSouth employees. (See Paper 59 at 22-24)

Of course, it is settled contract law that HealthSouth was entitled to terminate payments under the Agreement if the termination occurred in response to Dr. Ahlers' breach of the Agreement. See Cameron v. Double A Servs., 156 Vt. 577, 584 (1991)("Tender of performance is not required when there has been a positive and unequivocal refusal to perform."). The question thus becomes whether Dr. Ahlers breached the Agreement in opening his Williston clinic.

The parties devote most of their attention to discussing whether the Williston clinic violated the Agreement's restrictions on opening a competing clinic within specified geographical boundaries. (See Paper 59 at 22-24; Paper 63 at 25-26). Since material facts remain at issue with regard to the nature of Dr. Ahlers' Williston clinic and whether it violates the terms of the Agreement, summary judgement on this ground is inappropriate.

Dr. Ahlers' solicitation and hiring of HealthSouth employees, however, constitutes a breach of the Agreement that justifies HealthSouth's termination of monthly payments. The language of the Agreement is clear with regard to hiring, stating Dr. Ahlers may not "directly or indirectly, hire or contract with any employee or former employee of HealthSouth." (Paper 63, Ex. C at 2) When Dr. Ahlers left HealthSouth to open his Williston clinic, he hired Kimberly Gorton and Martha Kahanic, both of whom were employed by HealthSouth.

While there is some question as to the employment status of Ms. Gorton because she was assigned to HealthSouth by a temporary service agency, there is no question Ms. Kahanic was a HealthSouth employee. Instead, Dr. Ahlers contends the solicitation and hiring of Kahanic was permissible because she too was constructively discharged. (See Paper 63 at 28)

Dr. Ahlers' assertion that Ms. Kahanic left HealthSouth not because of his solicitation, which immediately coincided with her departure, but instead resulted from a constructive discharge because of a single event that occurred more than five months earlier, is simply unavailing. In short, Dr. Ahlers does not offer any evidence to demonstrate Ms. Kahanic was constructively discharged; again, most notably absent is the required showing of intolerable working conditions purposefully directed at obtaining her resignation. See In re Bushey, 142 Vt. 290, 298 (1982). The solicitation and hiring of Ms. Kahanic violates the express terms of the Agreement, and consequently HealthSouth was entitled to terminate the monthly payments that were given in exchange for the Agreement.

CONCLUSION

For the reasons discussed above, Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED.

Dated at Brattleboro, Vermont this __ day of March, 2004.

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J. Garvan Murtha, U.S. District Judge